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SENATE

REPORT
101-233

MERRIMACK RIVER STUDY ACT OF 1989

DECEMBER 20 (legislative day, NOVEMBER 6), 1989.—Ordered to be printed

Filed under authority of the order of the Senate of November 22 (legislative day, November 6), 1989

Mr. JOHNSTON, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S. 1046]

The Committee on Energy and Natural Resources to which was referred the bill (S. 1046) to designate the Merrimack River, in the State of New Hampshire, as a river to be studied for inclusion in the National Wild and Scenic Rivers System, and for other purposes, having considered the same, reports favorably thereon with amendments and an amendment to the title and recommends that the bill, as amended, do pass.

The amendments are as follows:

1. On page 1, line 8, strike "1276(a)) is" and insert in lieu thereof, "1276(a)), as amended, is further".

2. On page 2, line 1, strike " ^{1}(———)" and insert in lieu thereof, " ^{1}(106)".

3. On page 2, line 9, strike "1276(b)) is" and insert in lieu thereof, "1276(b), as amended, is further".

4. On page 2, line 11, strike " ^{1}(———)" and insert in lieu thereof, " ^{1}(8)".

5. On page 2, lines 14 and 15, strike "the Merrimack River Study Act of 1989." and insert in lieu thereof, "this paragraph."

6. On page 2, after line 15, insert the following new section:

SEC. 4. AUTHORIZATION OF APPROPRIATIONS

There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this Act.

7. Amend the title so as to read:

A bill to amend the Wild and Scenic Rivers Act of 1968 by designating a segment of the Merrimack River in the

S313-50

State of New Hampshire for study for potential addition to the National Wild and Scenic Rivers System, and for other purposes.

Purpose of the Measure

The purpose of S. 1046 is to designate a 35-mile segment of the Merrimack River in New Hampshire for study for potential addition to the National Wild and Scenic Rivers System.

Background and Need

The Merrimack River begins in Franklin, New Hampshire, at the confluence of the Pemigewasset and Winnepesaukee Rivers and flows south through the cities of Concord, Manchester and Nashua, through Lowell, Massachusetts, then east to the Atlantic Ocean. The river provides habitat for many animal species, including beavers, otters, muskrats, herons, kingfishers, Atlantic salmon and rainbow trout, and is wintering ground for the bald eagle. The Merrimack is also used heavily for recreational purposes, from canoeing and boating to fishing and swimming.

In 1981, the Department of the Interior placed the Merrimack on the Nationwide Rivers Inventory, a list of rivers that may warrant protection under the National Wild and Scenic Rivers Act. In its description of the values of the river, the Inventory stated that the Merrimack is "historically reported to be the most noted waterpower stream in the world, during the 19th century industrial era," providing power for the mills of cities such as Lowell and Manchester. The Inventory also noted that the Merrimack has unique recreational qualities due to its proximity to significant population concentrations in Concord and Manchester.

The Merrimack has been identified as a critical habitat for the restoration of Atlantic Salmon in the Merrimack River basin. For the past two decades, Federal and State agencies have been involved in a cooperative effort to restore anadromous fish in the basin, with approximately 200,000 salmon fry stocked annually in the river. Protection of the Merrimack is considered vital to ensure the success of that program.

Within the 35-mile stretch designated for study, there is one existing hydropower project on the river, the Garvins Fall Dam, near Concord, New Hampshire. S. 1046 would exclude the dam and its impoundment from the study.

Legislative History

S. 1046 was introduced by Senators Rudman and Humphrey on May 18, 1989. Companion legislation, H.R. 2432, has been introduced in the House of Representatives. The Subcommittee on Public Lands, National Parks and Forests held a hearing on S. 1046 on October 24, 1989.

At the business meeting on November 15, 1989, the Senate Committee on Energy and Natural Resources ordered S. 1046, as amended, favorably reported.

Committee Recommendations and Tabulation of Votes

The Senate Committee on Energy and Natural Resources, in open business session on November 15, 1989, by unanimous vote of a quorum present, recommends that the Senate pass S. 1046, if amended as described herein.

The rollcall vote on reporting the measure was 19 yeas, 0 nays, as follows:

YEAS	NAYS
Mr. Johnston	
Mr. Bumpers	
Mr. Ford	
Mr. Metzenbaum	
Mr. Bradley *	
Mr. Bingaman *	
Mr. Wirth *	
Mr. Conrad	
Mr. Heflin	
Mr. Rockefeller *	
Mr. McClure	
Mr. Hatfield *	
Mr. Domenici	
Mr. Wallop	
Mr. Murkowski *	
Mr. Nickles *	
Mr. Burns	
Mr. Garn *	
Mr. McConnell	

* Indicates voted by proxy.

Committee Amendments

During the consideration of S. 1046, the Committee adopted 7 amendments. Five of the amendments are either technical or clarifying in nature. Amendment 6 authorizes the appropriation of such sums as may be necessary to carry out the purposes of this Act. Amendment 7 amends the title to make it conform with language used in the Wild and Scenic Rivers Act of 1968.

Section-by-Section Analysis

Section 1 entitles the Act the "Merrimack River Study Act of 1989".

Section 2 amends subsection 5(a) of the Wild and Scenic Rivers Act by adding a new paragraph (106) which designates the segment of the Merrimack River from its origin to the backwater impoundment of the Hooksett Dam for study for potential addition to the National Wild and Scenic Rivers System. The segment to be studied excludes the Garvins Falls Dam and its impoundment.

Section 3 amends subsection 5(b) of the Wild and Scenic River Act by adding a new paragraph (8) which states that the Merrimack River study is to be completed not later that 3 years after the date of enactment of the Merrimack River Study Act of 1989.

Section 4 authorizes to be appropriated such sums as may be necessary to carry out the purposes of this Act.

Cost and Budgetary Considerations

The following estimate of the cost of this measure has been provided by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, December 18, 1989.

Hon. J. Bennett Johnston, Jr.,
Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 1046, the Merrimack River Study Act of 1989, as ordered reported by the Senate Committee on Energy and Natural Resources, November 15, 1989. We estimate that implementation of this bill would result in additional costs to the federal government totaling about $250,000 over the next three years, assuming appropriation of the necessary funds.

S. 1046 would add a 35-mile segment of the Merrimack River in New Hampshire to the list of rivers to be studied for inclusion in the Wild and Scenic River System. The study of the Merrimack River would have to be completed within three years of the bill's enactment. Based on information from the National Park Service, CBO estimates that preparation of the report would cost the federal government about $250,000 over the next three years.

Enactment of S. 1046 would not affect the budgets of state or local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Theresa Gullo, who can be reached at 226–2860.

Sincerely,

Robert D. Reischauer,
Director.

Regulatory Impact Evaluation

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 1046. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 1046, as reported.

Executive Communications

On October 16, 1989, the Committee on Energy and Natural Resources requested legislative reports from the Federal Energy Regulatory Commission, the Department of the Interior and the Office of Management and Budget setting forth the Administration's

views on S. 1046. The reports of the Department of the Interior and the Office of Management and Budget had not been received at the time the report was filed. When the reports become available, the Chairman will request that they be printed in the Congressional Record for the advice of the Senate. The views of the Federal Energy Regulatory Commission and the testimony provided by the National Park Service at the Subcommittee hearing on S. 1046 follow:

FEDERAL ENERGY REGULATORY COMMISSION,
Washington, DC, November 15, 1989.

Hon. J. BENNETT JOHNSTON,
Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.

DEAR CHAIRMAN JOHNSTON: Thank you for your letters of October 16, 1989, concerning S. 1046, a bill to designate the Merrimack River, in the State of New Hampshire, as a river to be studied for inclusion in the National Wild and Scenic Rivers System, and for other purposes, and S. 1524, a bill to amend the Wild and Scenic Rivers Act of 1968 by designating segments of the Pemigewasset River in the State of New Hampshire for study as a National Wild and Scenic River. Pursuant to your requests, enclosed are 50 copies of the Commission staff analysis of the bills for the use of the Senate Committee on Energy and Natural Resources.

I appreciate your inquiry. If the Commission can be of any further assistance in this matter, please do not hesitate to contact us.

Sincerely,

MARTHA O. HESSE,
Chairman.

FEDERAL ENERGY REGULATORY COMMISSION STAFF ANALYSIS OF S. 1046 AND S. 1524

S. 1046

On May 18, 1989, Senator Rudman, on behalf of himself and Senator Humphrey, introduced S. 1046, which (in Section 2) amends Section 5(a) of the Wild and Scenic Rivers Act (Rivers Act), 16 U.S.C. § 1276(a), to add to the list of rivers to be studied for potential addition to the National Wild and Scenic Rivers System (System) the segment of the Merrimack River, New New Hampshire, beginning at its origin at the confluence of the Pemigewasset and Winnipesaukee Rivers in Franklin, New Hampshire, and extending to the backwater impoundment of Hooksett Dam, but excluding the Garvins Falls Dam and its impoundment. The bill (in Section 3) also amends Section 5(b) of the Rivers Act, 16 U.S.C. § 1276(b), to provide that the study of the Merrimack River shall be completed and the report thereon submitted not later than three years after the date of enactment of S. 1046.

Pursuant to Section 7(b) of the Rivers Act, 16 U.S.C. § 1278(b), the Commission is prohibited from licensing the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works that would be on or directly affecting a river designated by Congress for study for potential addition to the System (Study River). Section 7(b), through a limitation on the first

prohibition, also prohibits the Commission from licensing project works above or below a Study River or on any stream tributary thereto if the project works would invade or diminish the scenic, recreational, and fish and wildlife values present in the Study River on the date it is designated for study. Finally, the Commission is prohibited by Section 7(b) from assisting through licensing the construction of any water resources project that would have a direct and adverse effect on the values for which Study River might be added to the System. The prohibition extends for a period of three complete fiscal years or as otherwise designated by Congress, whichever is later, and for an additional period of time, not to exceed three years following the submittal of the report (prepared by either the Secretary of Agriculture or the Secretary of the Interior, as appropriate) to the President and Congress, for congressional consideration of the report.

Section 7(b)'s prohibition on licensing has been interpreted by the Commission as applying to the issuance of exemptions. *See, e.g., Swanson Mining Corp.,* 22 FERC ¶ 61,184 (1983), *reh'g denied,* 30 FERC ¶ 61,184 (1985), *aff'd,* 790 F.2d 96 (D.C. Cir. 1986). However, since Section 7(b) prohibits only the authorization of construction, the Commission has held that it can issue preliminary permits authorizing the study (but not the construction) of projects to be located on Study Rivers. *See, e.g., City of Delta,* 4 FERC ¶ 61,102 (1978). Also the Commission has determined that it is the responsibility of the administering Secretary, not the Commission, to make determinations regarding the consistency of a proposed project with the provisions of the Rivers Act. *See China Flat Company,* 27 FERC ¶ 61,224 (1984).

A review of the Commission's files indicates that no pending applications for license or exemption would be directly or indirectly affected by S. 1046. The Garvin Falls Dam and its impoundment were licensed to the Public Service Company of New Hampshire in 1980 as part of Project No. 1893. However, S. 1046's proposed addition to Section 5(a) of the Rivers Act would specifically exclude this dam and impoundment from the scope of the Study River. Also, the downstream end of the proposed Study River would terminate above Hooksett Dam and its impoundment, which are also licensed as part of Project No. 1893. Since the license for Project 1893 expires on December 31, 2005, and since the prohibitions that would result from the enactment of S. 1046, if enacted this Congress, would expire prior to that date, the Commission's ability to act on applications for new license for the site in 2005 would not be affected by the enactment of S. 1046.

Commission records show no other outstanding licenses, exemptions, or preliminary permits for projects on the portion of the Merrimack River covered by S. 1046. Also, while 11 licensed projects are located on tributaries to the Merrimack River, the licenses for all of them would expire after the expiration of the prohibitions that would result from the enactment of S. 1046, if enacted this Congress. Thus, the Commission's ability to act on applications for new license for these sites at the expiration of the licenses would not be affected by the enactment of S. 1046. In addition, 15 exempted projects are located on tributaries to the Merrimack River. However, since exemptions are perpetual and thus do

not require reauthorization, enactment of S. 1046 should not affect these projects.

S. 1524

On August 3, 1989, Senator Humphrey, on behalf of himself and Senator Rudman, introduced S. 1524, which (in Section 2) amends Section 5(a) of the Rivers Act to add to the list of Study Rivers the segments of the Pemigewasset River, New Hampshire, from Profile Lake downstream to the southern boundary of the Franconia Notch State Park and from the northern Thornton Town line downstream to the Route 104 Bridge in New Hampton. The bill (in Section 3) also amends Section 5(b) of the Rivers Act to provide that the study of the Pemigewasset River segments shall be completed and the report thereon submitted not later than three years after the date of enactment of S. 1524. The bill (in Section 4) also authorizes to be appropriated such sums as may be necessary to conduct the study.

A review of the Commission's files indicates that one pending license application would be directly affected by S. 1524. On September 9, 1982, the North Stratford Equipment Corp. filed an application for minor license for the Livermore Falls Project No. 3572, to be located on the Pemigewasset River between the northern Thornton town-line and the Route 104 Bridge. Pursuant to the provisions of the Rivers Act discussed previously in relation to S. 1046, and assuming the appropriate Secretary determines that the proposed project would be covered by one of the prohibitions of Section 7(b) of the Rivers Act, the Commission would be prohibited from licensing this project for up to six years, should S. 1524 be enacted. No other applications for license or exemption would be directly or indirectly affected by S. 1524.

Commission records show that the Ayers Island Project No. 2456, licensed to the Public Service Company of New Hampshire in 1967, lies in part on the Thornton to Route 104 Bridge segment of the Pemigewasset River proposed to be made a Study River by S. 1524. More specifically, while the dam and powerhouse are not in the study area, the reservoir backs up into the study area, ending near the confluence of the Squam and Pemigewasset Rivers. The current license for this project expires on December 31, 1993. Since the prohibitions on licensing that would result from the enactment of S. 1524, if enacted this Congress, would be in effect at the time the Commission would be considering applications for new license for the project, S. 1524 could prevent the Commission from issuing a new license for the project during the prohibition period, if the administering Secretary determined that issuance of a new license would be covered by one of the prohibitions of Section 7(b) of the Rivers Act.

Commission records show no other outstanding licenses, exemption, or preliminary permits on the portions of the Pemigewasset River covered by S. 1524. One licensed project and two exempted projects are located on tributaries to the Pemigewasset River. However, since the license for the licensed project will extend until after the expiration of the prohibitions that would result from the enactment of S. 1524, if enacted this Congress, and since, as dis-

cussed previously, exemptions are perpetual, enactment of S. 1524 should not affect these projects.

STATEMENT OF HERBERT CABLES, DEPUTY DIRECTOR, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR

Mr. Chairman, it is a pleasure to appear before this Committee today to testify in support of S. 1046, a bill which would add a portion of the Merrimack River in the State of New Hampshire to section 5(a) of the Wild and Scenic Rivers Act, thereby calling for its study for possible inclusion within the Wild and Scenic Rivers System.

In 1982 the National Park Service released a Nationwide Rivers Inventory, the result of a 6-year study to identify the Nation's remaining free-flowing streams which are in relatively natural and undeveloped condition and which possess scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values which make them potential candidates for conservation through local, State or Federal action. The study envisioned in S. 1046 covers approximately 35 miles of the Merrimack's main stem, of which roughly 28 miles in the 2 segments identified are listed in the nationwide inventory.

The Merrimack's significant river-related resources include a significant Atlantic salmon fishery under restoration, its unique proximity to regionally significant urban populations, its sparsely developed, free-flowing nature, its setting in a geologically diverse composite landscape, and its culturally significant waterpower uses of the past.

Mr. Chairman, there is considerable concern for the future of the Merrimack River and strong private, local and State support for this study. The governing bodies of each of the 5 communities bordering the proposed study area have passed resolutions of endorsement to document their support. In those resolutions, the towns also indicated their desire for river conservation planning and future protection to be based at the local level. In light of those desires and the pattern of existing landownership along the Merrimack, it appears that a study strategy emphasizing alternatives to Federal land acquisition and management not unlike that employed in the recent study of the Wildcat River, also in New Hampshire, would enjoy a high likelihood of success.

Mr. Chairman, S. 1046 contains no language authorizing the appropriation of funds for this study. We recommend an additional subsection be added at the end of the bill to authorize the appropriation of $250,000 to accomplish the purposes of S. 1046. Because the proposed study would involve the complicating factors of 5 communities, a predominance of private land, and local desires to maintain existing ownership and management patterns, higher than normal costs for studies of this nature can be expected.

Mr. Chairman, this concludes my remarks concerning S. 1046. I would be pleased to respond to questions at your pleasure.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes the following changes in existing law made by the bill as reported (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law to which no change is proposed is shown in roman):

WILD AND SCENIC RIVERS ACT

AN ACT To provide a National Wild and Scenic Rivers System, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Wild and Scenic Rivers Act".

* * * * * * *

SEC. 5. (a) The following rivers are hereby designated for potential addition to the national wild and scenic rivers system:

* * * * * * *

(106) MERRIMACK RIVER, NEW HAMPSHIRE.—The segment from its origin at the confluence of the Pemigewasset and Winnipesaukee Rivers in Franklin, New Hampshire, to the backwater impoundment at Hooksett Dam, excluding the Garvins Falls Dam and its impoundment.

* * * * * * *

(b)(1) The studies of rivers named in subparagraphs (28) through (55) of subsection (a) of this section shall be completed and reports thereon submitted by not later than October 2, 1979. *Provided,* That with respect to the rivers named in subparagraphs (33), (50), and (51), the Secretaries shall not commence any studies until (i) the State legislature has acted with respect to such rivers or (ii) one year from the date of enactment of this Act, whichever is earlier.

(8) The study of the Merrimack River, New Hampshire, shall be completed and the report thereon submitted not later 3 years after the date of enactment of this paragraph.

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